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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

Estate of ROBERT FRANCO, Deceased.

STACEY FRANCO,

Claimant and Appellant,

v.

SUSAN LENZ, as Special Administrator,
etc.,

Objector and Respondent.

C060246

(Super.Ct.No. PR76021)

Stacey Franco appeals from an adverse judgment in a probate court proceeding involving the estate of her father, Robert Franco.¹ She contends the probate court erred in determining that her claim for conversion was barred by the statute of limitations and that her

¹ For simplicity and to avoid confusion, we shall refer to the parties by their first names.

creditor's claim against the estate was not supported by substantial evidence. We shall affirm the judgment.

FACTS

Robert, who died April 10, 2005, had four children: Stacey, Dan, Tracey, and Guy. His will, drafted in March 2005, disinherited Stacey and Guy, and bequeathed his personal property to Tracey and Dan. Robert bequeathed the residue of his estate to the trustee of the Bob Franco Family Trust. A copy of the trust is not included in the appellate record, but it appears that the principal beneficiary was Virginia Mazzer, a woman Robert met around 1991. Following Robert's death, Tracey filed a petition to probate Robert's will and was appointed special administrator of his estate.

On October 20, 2005, Stacey filed a petition to transfer certain items of personal property from Robert's estate pursuant to Probate Code section 850, subdivision (a)(2)(C) (hereafter section 850). Two months later, Stacey submitted a creditor's claim in Robert's estate in the amount of \$250,000, which was the estimated value of the items of personal property involved in her section 850 petition.

Stacey and Tracey, in her capacity as special administrator, then stipulated Stacey's creditor's claim would be deemed rejected in its entirety, and she could pursue it as a cause of action for conversion as part of the trial concerning the section 850 petition.

Thereafter, on May 10, 2006, Susan Lenz replaced Tracey as the special administrator of Robert's estate.

The evidence presented at the two-day trial disclosed that in 1974, Stacey began working at Robert's business, the Franco Center. Stacey and Robert had a close relationship but it disintegrated

around 1991, when Stacey became unhappy with Robert's relationship with Virginia.

In July or August 1991, Robert came unannounced to Stacey's apartment, went into her bedroom and took a silver box containing Stacey's jewelry. Stacey testified she demanded the box back but Robert refused, stating he was taking it for safekeeping. Rosalio Estrada, who accompanied Robert that day, testified that Robert was mad at Stacey and would not give the box back to Stacey. When Stacey asked if he was going to sell it, he replied no, he was going to keep it for her. Stacey "was hollering a little bit" and Robert's brother, John, tried to prevent Robert from leaving with the box. The two brothers engaged in a pushing and shoving match, and John was injured. Robert left with Estrada, and John called the police. When the police arrived, Stacey did not make a complaint to the police; her "uncle spoke on [her] behalf."

A few months later, Stacey ceased working for her father, Robert. Before she quit, Stacey asked for her jewelry box. Robert did not respond. Stacey was worried that her "precious things" would be stolen by the "thieves in [her] family." Nevertheless, she decided not to press the issue because Robert could be very unreasonable, and she was hoping he would come to his senses and give her jewelry box back. She thought "he had it for safekeeping."

Between 1992 until Robert's death in 2005, Stacey had only one face-to-face conversation with him, which occurred when her uncle died. They had one telephone conversation some time in 1999, when Robert sought custody of Tracey's children because Tracey was abusing drugs. Stacey and Robert never reconciled, and she never

recovered her jewelry box. Stacey testified: "There's not a day that has gone by in my life since that jewelry was taken away from me that I have not missed my jewelry."

The remainder of Stacey's claim against the estate concerned items of personal property that Robert stored for her before their estrangement in 1991. The property included jewelry, furniture, and Hummel figurines that Stacey had inherited. According to Stacey, Tracey told her Robert had disposed of her possessions before his death. Stacey did not believe this was true because her father would never have sold Stacey's things. Even when, in 2000, Robert sold the Franco Center where her belongings were stored, Stacey assumed that he would save her things for her. Stacey believed that after Robert died, "the thieves in [her] family must have gotten [her] stuff"

No definitive evidence was presented concerning the whereabouts of Stacey's personal property or when it vanished.

In its posttrial brief, the estate argued: The conversion, which occurred in 1991, was barred by the statute of limitations. As for the remaining property that was the subject of Stacey's creditor's claim, she had stored the items at Robert's house for many years, and Robert was nothing more than a gratuitous bailee. As such, he had only a slight duty of care, and Stacey failed to meet her burden of proving that he had breached that duty. There was no evidence that Robert disposed of the items, or that they were stolen during his lifetime. To determine what happened to Stacey's property, "one would have to go beyond the evidence produced and rely on guesswork or speculation."

Stacey responded: A fiduciary relationship existed because Robert was her father. Thus, she had a right to rely on him to take care of her property, and to rely on his promise that he was going to hold her silver jewelry box for safekeeping. Accordingly, the statute of limitations did not begin to run until Robert's death, when she discovered that he had breached his promise and converted her property. Stacey disputed that Robert was a gratuitous bailee, disputed that the items were stolen after Robert's death, and claimed that Robert breached his commitment to store the items. Thus, his estate was responsible to compensate her.

The court ruled: Stacey's claim regarding the silver jewelry box was barred by the statute of limitations, which began to run in 1991 when Robert took it and ignored her requests to return it. The fact that Stacey and Robert had a fiduciary relationship did not alter the commencement of the statute of limitations. As for the other items of personal property, Robert was only a gratuitous bailee, who owed Stacey only a slight duty of care. The court found there was no evidence that Robert breached that duty and, in fact, there was "no clear evidence as to the disposition of those items."

DISCUSSION

I

Stacey contends the estate waived the statute of limitations defense by failing to plead it in the probate court. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581 [generally the defense must be pleaded in the answer or raised in a demurrer; otherwise, it is waived].)

However, Stacey, not the estate, has forfeited her claim because she did not object on this ground in the probate court. "[A] party is precluded from urging on appeal any point not raised in the trial court. [Citation.] Any other rule would ``permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.'" [Citations.]' [Citation.]" (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412; accord, *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)

Furthermore, Stacey permitted the statute of limitations defense to be litigated, as evidenced by the arguments presented in the parties' posttrial briefs. ``A party cannot permit an issue to be litigated and on appeal escape the consequences by claiming that such issue was not pleaded.' [Citations.]" (*Collison v. Thomas* (1961) 55 Cal.2d 490, 498; accord, *Estate of Scott* (1987) 197 Cal.App.3d 913, 916, fn. 2.)

Stacey also contends that there is no substantial evidence to support the court's determination that the three-year statute of limitation for conversion (Code Civ. Proc., § 338, subd. (c)) commenced to run in 1991. We disagree.

``Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' [Citation.]" (*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 747.) The foundation for a conversion claim ``rests upon the unwarranted interference by

defendant with the dominion over the property of the plaintiff from which injury to the latter results.'" (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

Ordinarily, the three-year statute of limitations (Code Civ. Proc., § 338, subd. (c)) begins to run from the date of conversion, even if the injured owner is ignorant of the violation of her property rights. (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 916; *Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 429.) This comports with the general rule that the statute of limitations begins to run when a cause of action accrues, and an action accrues on the date of injury. (*Naftzger v. American Numismatic Society, supra*, 42 Cal.App.4th at p. 428.)

Here, Robert took Stacey's property in 1991 and refused or ignored her demands to return it. The probate court correctly determined that Stacey's property was converted in 1991, and that the statute of limitations expired three years later, thus barring Stacey's action following her father's death in 2005.

Stacy argues the court overlooked that she had a fiduciary relationship with her father, and that she was entitled to rely on his promise to safeguard her jewelry unless and until he repudiated their relationship. However, as we will explain, her claim is undermined by her failure to request a statement of decision and by the standard of review applied in challenges to the sufficiency of the evidence. Therefore, we need not decide whether a father has a fiduciary relationship to his adult daughter.

Where neither party has requested a statement of decision, the written opinion of the court does not become a statement of

decision. Rather, it is merely a tentative decision, which is not binding on the court and cannot be used to impeach the judgment. (*Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 551-552; Cal. Rules of Court, rule 3.1590(b).)

"It is the statement of decision which allows the court to place upon *the record* its view of facts and law of the case. [Citation.] A failure to request a Code of Civil Procedure section 632 statement results in a waiver of such findings." (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647, italics in original.) Where no statement of decision is requested, "all intendments will favor the trial court's ruling and it will be presumed on appeal that the trial court found all facts necessary to support the judgment." (*Id.* at p. 649.)

Where an appellant challenges the sufficiency of the evidence, we must start with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant's burden to demonstrate otherwise. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The appellant's brief must set forth *all* of the material evidence bearing on the issue, not merely the evidence favorable to the appellant; and, if the brief fails to demonstrate how the evidence does not sustain the challenged finding, the claim of insufficiency of the evidence is forfeited. (*Ibid.*; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.)

An appellant must also be mindful that the reviewing court does not have the power to reweigh the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. (*Huang v.*

Board of Directors (1990) 220 Cal.App.3d 1286, 1294.) The test is "whether there is substantial evidence in favor of the respondent. If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 370, p. 427, italics omitted.)

Contrary to the aforesaid rules of appellate procedure, Stacey does not set forth all the evidence and show how it does not support the judgment. Rather, she views the evidence in the light most favorable to herself, stating that her father "promised that he had no intentions of selling Stacey's jewelry," he "promised her that he was just taking the box and its contents for safekeeping," and "he promised to keep her jewelry safe for her." She contends it was reasonable for her to rely on his promises in light of the "finding" in the trial court's written opinion that Robert was her fiduciary. However, Stacey is the only person who testified about promises of "safekeeping." Rosalio Estrada testified that Robert told Stacey he was keeping the jewelry; and that, when asked if he was going to sell it, he replied no, he was going to keep it for her. But this is not the equivalent of a promise to safeguard the jewelry for Stacey. Nor did Stacey agree to such an arrangement. Indeed, she testified: "There's not a day that has gone by in my life since that jewelry was taken away from me that I have not missed my jewelry."

Furthermore, Stacey ignores that the probate court's written opinion is not a statement of decision. The court's judgment says nothing about a fiduciary relationship between father and daughter, who had been estranged for over a decade; and there is no finding by

the court that Robert promised to safeguard the jewelry box for her. Therefore, we may imply findings necessary to support the judgment as long as they are supported by substantial evidence. This includes a finding that the court rejected Stacey's testimony of Robert's promise to *safeguard* her jewelry box, and found that Robert exercised dominion and control over the box in contravention of Stacey's rights in 1991 when he took the box and refused to return it.

The record supports implied findings that (1) Robert was angry at Stacey for her meddling in his relationship with Virginia, (2) he took Stacey's belongings as a controlling means of punishment, and (3) Stacey did nothing about the conversion, not because she believed Robert was safekeeping the items for her, but because she believed he was too unreasonable to deal with and she *assumed*, year after year, that her estranged father would keep her things for her. Stacey's assumption was incorrect and cannot be construed as a reasonable reliance on the promise of a fiduciary, which would warrant delaying the accrual of her cause of action for conversion.

In sum, substantial evidence supports the court's ruling that Stacey's action was barred by the statute of limitations.

II

Stacey also contends the court erred in finding that she failed to meet her burden of proving that she was entitled to compensation for the remainder of her creditor's claim. She asserts the court erroneously placed on her the burden of proving that Robert breached his duty of care as a gratuitous bailee, rather than requiring the estate to prove that no breach occurred. According to Stacey, when the burden is placed on the estate, as it should be, there is no

substantial evidence that Robert did not breach his duty of care with respect to Stacey's personal property, which he had stored for her at his home and at the Franco Center.

For the reasons expressed in part I, Stacey forfeited this claim by failing to raise the point in the probate court in response to the estate's assertion that Stacey had the burden of proof. Furthermore, as we shall explain, the court placed the burden of proof on the proper party.

Stacey relies on *Gebert v. Yank* (1985) 172 Cal.App.3d 544 (hereafter *Gebert*) for the general proposition that, where a bailor establishes a breach of the bailment contract, the burden shifts to the bailee to prove that the failure to redeliver was not caused by the bailee's negligence. (*Id.* at pp. 551-552.) However, *Gebert* is not persuasive authority for Stacey's position because that case concerned a bailment for hire, not a gratuitous bailment.

A gratuitous bailment is a bailment for which the bailee receives no consideration. (Civ. Code, § 1844.) A bailment that is not gratuitous is a bailment for hire. (Civ. Code, § 1851.) A gratuitous bailee has the responsibility to use only *slight* care with respect to the bailed property. (*Todd v. Dow* (1993) 19 Cal.App.4th 253, 260-261.) In contrast, a bailment for hire imposes on the bailee the duty to use *ordinary care* with respect to the bailed property. (*Gebert, supra*, 172 Cal.App.3d at p. 551.) The distinction between the compensation and obligations of the two kinds of bailees affects the burden of proof. (Cf. *Pawn v. Wall* (1928) 88 Cal.App. 597, 600 [whether one is a gratuitous bailee

or one for hire affects the burden of proof and excuse for failure to redeliver].)

The burden-shifting rule was first stated in cases involving warehousemen (*George v. Bekins Van & Storage Co.* (1949) 33 Cal.2d 834, 838-841, and cases cited), and it was then extended to other situations. *Downey v. Martin Aircraft Service* (1950) 96 Cal.App.2d 94, 97-100 (hereafter *Downey*) observed: "The logic of the rule would seem to be as much applicable to a garagekeeper, parking-lot operator, or person who accepts a chattel for purposes of repair, as it is to a warehouseman. In either case the party has undertaken, *for reward*, to use ordinary care in the safekeeping of a chattel." (*Id.* at pp. 98-99, italics added.) "[W]hen a bailee who is under the duty of exercising ordinary care is unable to redeliver the subject of the bailment, it is not enough for him to show that the property was lost, stolen or destroyed, but that if he relies upon such fact to excuse his failure, he must go further and show that the loss occurred without negligence on his part. . . . [A] contrary rule would place upon the plaintiff, in many cases, an impossible burden. It is just and fair that one who undertakes *for reward* to care for a chattel should have the burden of explaining its loss or destruction while in his custody and of negating an inference of negligence on his part arising from such loss or destruction." (*Id.* at pp. 99-100; accord, *Gebert, supra*, 172 Cal.App.3d at pp. 551-552.)

Thus, "a bailee *who is under the duty of exercising ordinary care*" has the burden "of negating an inference of *negligence*." (*Downey, supra*, 96 Cal.App.2d at pp. 99-100, italics added.) Only the bailee for hire, however, has a duty to exercise "ordinary

care." A gratuitous bailee has a duty to exercise only "slight care" because the bailee is doing a favor for the bailor. Thus, it is not "just and fair" to shift the burden of proof to the gratuitous bailee.

For reasons stated above, Stacey has failed to establish that the court erred in placing the burden of proof on her.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

SCOTLAND, P. J.

We concur:

NICHOLSON, J.

ROBIE, J.